


**STATE OF CALIFORNIA
BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION**

In the Matter of the Appeal by

Case No. 03-G-0127


Senior Tax Representative
For Reinstatement After Automatic
Resignation (AWOL)

Represented by:

Maureen Lynch
Labor Relations Representative
California State Employees Association
5450 Ralston Street, Suite 104
Ventura, CA 93003

Respondent:

Board of Equalization
Personnel Management Division
450 N Street, MIC 20
Sacramento, CA 95814

Represented by:

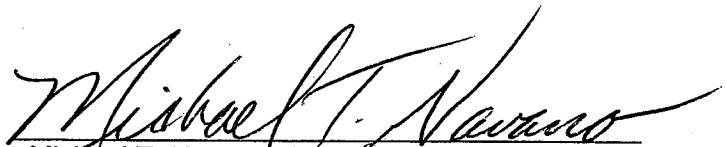
W. Gregory Day
Senior Tax Counsel
Board of Equalization
450 N Street, MIC 82
P.O. Box 942879
Sacramento, CA 94279-0082

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted as the Department's Decision in the above matter.

IT IS SO ORDERED:

April 23, 2004.



Michael T. Navarro, Interim Director
Department of Personnel Administration

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PROPOSED DECISION

This matter was heard before Wesley M. Travis, Jr., Administrative Law Judge (ALJ), Department of Personnel Administration (DPA) at 9:15 a.m., on February 3, 2004, at Ventura, California.

, appellant, was present and was represented by Maureen Lynch, Labor Relations Representative, California State Employees Association (CSEA).

W. Gregory Day, Senior Tax Counsel, Legal Division, Board of Equalization, represented the Board of Equalization (BOE), respondent.

The record was held open until April 1, 2004, when final closing arguments were filed by the parties.

Evidence having been received and duly considered, the ALJ makes the following findings of fact and Proposed Decision.

I

JURISDICTION

Respondent automatically resigned appellant effective October 31, 2003, for being absent without approved leave from October 6, 2003 through October 17, 2003. CSEA filed a request (appeal) for reinstatement after automatic resignation on November 3, 2003. The appeal complies with the procedural requirements of Government Code section 19996.2.

II

WORK HISTORY

At the time of appellant's resignation, appellant was employed as a Senior Tax Representative in the Ventura office of the BOE. Appellant began working for BOE on September 12, 1989.

The duties of a Senior Tax Representative are to provide assistance to taxpayers to ensure compliance with tax laws, collect delinquent taxes, and perform a variety of compliance and collection functions. Senior Tax Representatives perform the most complex compliance and collection functions.

III

CAUSE FOR APPEAL

By letter dated October 20, 2003, respondent notified appellant that effective October 31, 2003, she would be considered to have automatically resigned retroactive to October 6, 2003. Thereafter, CSEA filed appellant's appeal for reinstatement with DPA. No cause was stated in the appeal.

IV

REASON FOR BEING ABSENT

Appellant testified that during the month of October 2003, she fled her primary residence to distance herself from her abusive husband. From October 1, 2003 through October 20, 2003, appellant stayed in several locations – a domestic violence shelter (shelter), her sister's house, a friend's house, and, for a short time, in a rental car.

Appellant argued that the stress and depression she suffered during this period was so debilitating, she was unable to work. However, appellant presented no persuasive evidence to corroborate the fact that she was either mentally or physically incapable of working or that her temporary living arrangements prevented her from reporting to work.

V

REASON FOR NOT OBTAINING LEAVE

Appellant argues that her reason for not obtaining leave was excusable for basically four reasons:

First, appellant argued she was unable to contact her supervisor to request leave because of her temporary living arrangements. According to appellant, she fled her primary residence because she was being abused by her spouse, and stayed at a shelter some time during the early part of October 2003. Appellant alleged that the shelter's restrictive no-contact policy allowed its residents only one out-going telephone call, and that she made that call to her doctor. Appellant claims that she asked her sister to call her employer while she was in the shelter. However, appellant presented no evidence to corroborate her testimony about the shelter's restrictive telephone policy; she presented no corroborating evidence verifying the period of time she was in residence at the shelter; and she presented no corroborating evidence that she asked her sister to notify her employer. Neither appellant's sister nor anyone working at the shelter was called to testify.

After appellant left the shelter, she alleged that she lived at her sister's house for awhile, slept in a rented car for a couple of days, and stayed at a friend's house for a brief period of time. Although appellant admitted she had continual access to a telephone, she failed to notify respondent during her twelve-day absence. Appellant's first-line supervisor testified that neither he nor anyone else at the BOE received a telephone call from appellant or her sister notifying respondent about appellant's temporary residence at the shelter or at any of the other places indicated.

Second, appellant argued that she failed to call-in or contact respondent because she was suffering from stress, compounded by the effects of the prescribed medication she was taking for depression. Appellant failed to present reliable medical evidence to support this contention. Although stress and depression may, at times, be severely debilitating to the point of affecting an individual's ability to work, there was insufficient evidence in the instant case to support appellant's disability claim or to excuse her from her obligation to contact respondent.

Third, appellant contended she did not need to obtain leave because she was not progressively disciplined for prior violations of the department's leave policy. There was no evidence that appellant had been absent without leave for five consecutive days in the past. Unlike discipline cases, there is no requirement that a respondent tolerate numerous five-day absences before invoking Government Code section 19996.2, a non-disciplinary action.

Finally, appellant argued that her failure to provide medical substantiation to her employer at the time of absence was consistent with respondent's policy of allowing employees to obtain subsequent leave approval by providing a doctor's note shortly after a day's absence. This practice was undisputed.

At hearing appellant presented three doctors' notes for the relevant time period. However, she failed to properly authenticate these and respondent objected. Appellant admitted she had previously received an Informal Reprimand for forging and falsifying eight doctor's notes in 2000 through 2001 which she submitted to respondent as medical verifications for previous absences. Appellant failed to call any medical provider at hearing to substantiate the doctor's notes. Respondent's objection was sustained. Respondent had a valid reason for not accepting appellant's doctors' notes in this instance.

Even if the medical notes had been accepted into evidence, they do not substantiate appellant's complete inability to work from October 6, 2003 to October 13, 2003. One doctor's note cleared appellant to work for four hours a day beginning on October 6, 2003, and cleared her to work full-time beginning on October 13, 2003. However, appellant failed to show up for work on any of these days or on any following days.

Appellant's argument that she had a valid reason for not obtaining leave based on appellant's acceptance of medical documentation after the leave period does not address appellant's failure to comply with respondent's call-in requirement. In addition to providing medical substantiation, respondent required employees to contact their first-line supervisor by telephone on the day of or prior to the day of absence.

Appellant was fully aware of the department's call-in policy. On October 10, 1996, approximately seven years earlier, appellant prepared a memorandum for respondent which specifically addressed an employee's mandatory duty to notify respondent when taking sick leave or leave for other unscheduled emergencies. The memorandum states, in relevant part: "It is District policy that whenever an employee is sick, the employee will call his/her supervisor. If the supervisor is not available, the next level of supervision should be contacted. The same policy applies to vacation requests for unscheduled emergencies." More recently, on January 31, 2003, appellant's supervisor sent her a memorandum stating, in relevant part. "As I have stated to you before, you must call in for any absence that you do not already have medical or other approval for." In addition, appellant's first-line supervisor credibly testified that he counseled appellant on numerous occasions for failing to call in and that appellant acknowledged on each occasion that she understood this obligation.

Appellant testified she "may have called in on October 16, 2003." However, respondent has no record of appellant calling in on October 16 or at any time during the period of October 6, 2003 through October 17, 2003. Appellant's first-line supervisor maintained a daily log during the relevant period of time appellant was absent. The log specifically noted those days that appellant failed to call in and/or failed to provide proper medical verification for the month of October 2003.¹ There was no medical evidence indicating appellant's alleged medical condition rendered her incapable of using a telephone or otherwise communicating with her employer.

VI

READY, ABLE AND WILLING

Although appellant testified at hearing that she was ready, able and willing to return to work, her allegation was unsupported by the evidence.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ALJ MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Government Code section 19996.2 provides an automatically separated employee with the right to file an appeal for reinstatement with the DPA. Section 19996.2 also provides:

"Reinstatement may be granted only if the employee makes a satisfactory explanation to the department [DPA] as to the cause of his or her absence and his or her failure to obtain leave therefor, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position or, if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement."

Pursuant to *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the Court held that an employee terminated under the automatic resignation provision of section 19996.2, has a right to a hearing to examine whether she had a valid excuse for being absent, whether she had a valid reason for not obtaining leave and whether she is ready, able, and willing to return to work. DPA is *not* charged with examining whether the appointing power acted properly with regards to the actual termination. Further, appellant has the burden of proof in these matters and must prove by a preponderance of the evidence that she had a valid excuse for her absence and failure to obtain leave and that she is currently able to return to work.

¹ Although appellant's second-line supervisor, [REDACTED] was not called to testify at hearing, the parties stipulated that, if called as a witness, [REDACTED] would testify that he did not receive any form of communication from the appellant at any time during the relevant time period informing him that appellant would not be coming into work.

[REDACTED] continued)

Appellant testified she was unable to contact her supervisor to request leave during the relative time period because of her temporary living arrangements. However, she presented no corroborating evidence that these circumstances necessarily prevented her from working or from notifying her supervisor about her absence.

Appellant also testified that she did not obtain leave because she was under a lot of stress due to spousal abuse and that she was suffering from the effects of the medication she was taking for depression. However, appellant failed to present properly authenticated or present reliable medical evidence to support this contention.

Appellant further contended that respondent allowed its employees to supply medical verification at the end of the month for any days absent during the month. She argues that because of the department's past practice and because of its failure to progressively discipline her in this regard, she was relieved of her responsibility to notify her supervisor about being absent. She also contended "she may have" complied with appellant's call-in requirement on only one occasion. Appellant's arguments are unpersuasive and are, therefore, rejected.

Appellant failed to prove by a preponderance of the evidence that she had a valid excuse for her absence and for failure to obtain leave. She also failed to prove that she was currently able to return to work.


* * * * *

WHEREFORE IT IS DETERMINED that the appeal of [REDACTED] for reinstatement after automatic resignation from the position of Senior Tax Representative effective October 31, 2003, is denied.

* * * * *

The above constitutes my Proposed Decision in the above-entitled matter. I recommend its adoption by DPA as its decision in the case.

DATED: April 16, 2004.



Wesley M. Travis, Jr., Administrative Law Judge
Department of Personnel Administration